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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. 179.

CHARLES S. LANDRAM AND JOHN A. BRODDUS, EXECUTORS OF CONSTANCE K. VERTNER, DECEASED, AND LILLIE K. VERTNER, *Appellants.*

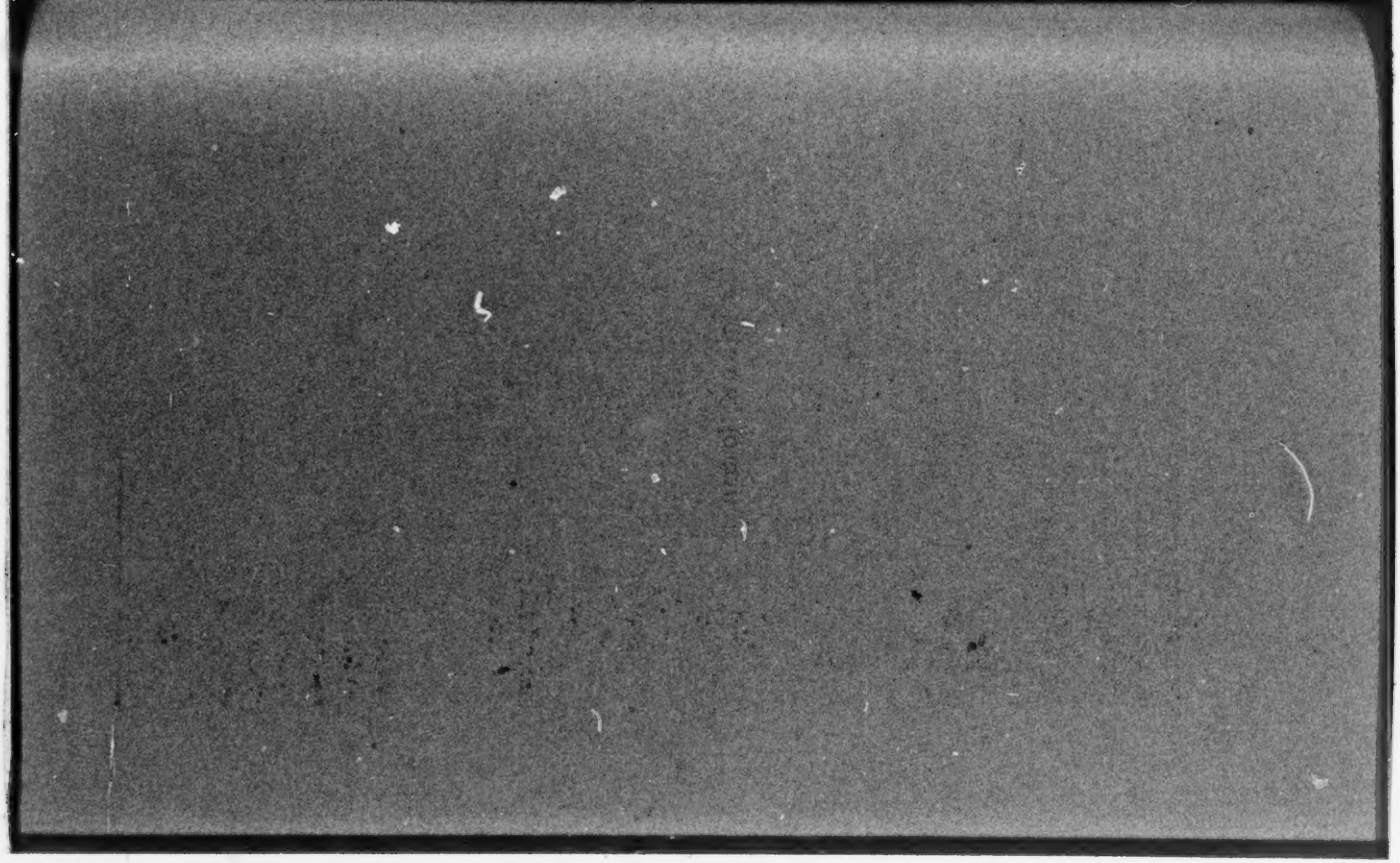
vs.

GABRIELLA K. JORDAN.

BRIEF ON BEHALF OF PETITIONER.

Mary B. Kearney.

FRANK SPRIGG PERRY,
Counsel for Petitioner.



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BRIEF ON BEHALF OF PETITIONER.

On October 29, 1901, Gabriella K. Jordan, the appellee herein, filed a bill of review in the Supreme Court of the District of Columbia, praying that the court review and set aside a former decree passed June 27, 1900. (Rec. 1.) The original suit was for the construction of the will of Thomas Kearney, who died in Texas, on July 4, 1896. In the original suit Elijah S. Drake, Trustee, was the Complainant, and the Defendants were Leroy M. Taylor, Trustee, Gabriella K. Jordan and the daughter and grandchildren of the testator. The decree of June 27, 1900, declared void certain provisions of the will of Thomas Kearney, devising real property in Washington, D. C., among others, that by which property was conveyed to Gabriella K. Jordan. (Rec. 24.) All of this property then vested in the heirs at law of Thomas Kearney. At the time of his death Thomas Kear-

ney left two children, Edmund Kearney and Constance Kearney Vertner. Edmund Kearney died on June 4, 1898, intestate as to this Washington real estate, and left surviving him the sister, Constance Kearney Vertner, and his widow, Mrs. Mary B. Kearney, the petitioner herein. Your petitioner, Mrs. Mary B. Kearney, is interested in the present suit to the extent of her dower rights of one-third of the property which descended to her husband, or a life estate of one-sixth of the total property in Washington, D. C.

PETITIONER A PROPER PARTY.

Upon a bill of review all parties in interest should be made parties defendant to the suit.

> "The legal object and effect of a bill of review being to have the decree examined and reversed, it was formerly held to be only against those who were parties to the original bill, (2 Barb. Ch. Pr. 94; Lube, Eq. Pl. 129,) in analogy to a proceeding in error. It was afterwards extended so as to embrace other parties in interest."
>
> *Friley vs. Hendricks,* 27 Miss. 412.

Quoted with approval in

Ralston vs. Sharon, 51 Fed. R. 703, 714.

The question of who are parties in interest has been fully discussed in many decisions in the United States Supreme Court.

> "The act says it shall be lawful for the Court to entertain jurisdiction; but, as is observed by this Court, in *Mallow vs. Hinde,* 12 Wheat., 198, when speaking of a case where an indispensable party was not before the Court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever

may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actual or constructively before the Court.' "

Shields vs. Barrow, 17 How. 130, 140.

In the case of *Williams vs. Bankhead,* 19 Wall. 563, is found an example of an indispensable party without whom no decree could be made. It was contended that the widow of James H. Branch, who was not joined in the suit, was not an indispensable party because the only inconvenience arising from proceeding without her would be the double liability to which the defendant would be exposed. But the Court held that the suit concerned the disposal of a specific sum in which the widow claimed an interest and that she was an indispensable party.

Where the Complainants have no rights separable from or independent of the rights of persons not made parties, and where a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties, a court of equity will not proceed to a decree.

Mallow vs. Hinde, 12 Wheat. 193, 198.
Cameron vs. McRoberts, 3 Wheat. 591.

Can this Court in the case now before it render a decree between the Appellants and the Appellee which will do substantial justice and yet not affect the rights of your petitioner. Since the decree of June 27, 1900, petitioner has been entitled to one-sixth of the entire rents and revenues from the Washington property which was in the hands of the trustees. Should this Court affirm the decree of the Court of Appeals and the Supreme Court, District of Columbia, this interest of your petitioner, her dower in one-half of the property descended to her husband, will be reduced proportionately.

The dower right of petitioner is a valuable interest and is one which the law recognizes and protects. The fact that dower has not been assigned does not alter this proposition.

> "The lands, which descended to the children of Francis W. Shephard, her deceased husband, were charged with her dower right; and that is an interest which the law not only recognizes but protects, by giving the right to the claimant to maintain an action to recover it. The right, which was, inchoate in her, became, by her husband's death, a vested interest; and until, by assignment or satisfaction, that right is extinguished, she is entitled to stand with the present owners of the realty and to unite with them in asserting the right to restrain the continuance of the defendant's acts, by which the realty is said to be injured and its value impaired."
>
> *Shepard vs. Manhattan Railway Co.*, 117 N. Y., 446.
> See *Sykes vs. Chadwick*, 18 *Wall.* 145.
> *Rogers vs. Potter*, 32 N. J. L. 78.

Your petitioner was entitled to be made a party in the lower courts and to be heard. No decree can be made in this case without materially affecting petitioner's interests.

JURISDICTION.

The original bill in this cause, after praying for the issuance of the writ of subpœna against defendants and asking for the appointment of a guardian *ad litem* for certain infant defendants, contains the following prayers:

> "3. That by a decree of this honorable Court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised.
> "4. That he shall have such other and further relief as the nature of the case may require." (Rec. 8.)

In the body of the bill it was recited that certain questions had arisen about the validity of the provisions of the will relating to real estate in the District of Columbia and E. S. Drake, the Complainant, alleged that he had been advised that the same were void because they attempted to create a perpetuity.

There is no question but what equity has jurisdiction over trusts created by a will, as well as in other cases of trusts.

22 Ency. Pleading and Practice, p. 23.

A trustee is not required to run any risk in the management of the trust estate and, if he is in doubt about his safety or security, he should apply to a court of equity for instructions.

Dimmock vs. Bixby. 20 Pick (Mass.) 374.

In no case does this obtain with greater force than in the case now before the Court. There was grave doubt whether the provisions of the will of Thomas Kearney created a trust or not. No agreement of the *cestuis que trust* could materially assist the trustees as several of the parties interested were infants. The aid of the equity court was properly sought by the trustee.

The case of *Heald vs. Heald*, 56 Md. 300, is directly in point. In that case a bill in equity was filed by a trustee named in a will. The Court held:

> "The bill further charges, that doubts have arisen as to the validity of certain trusts upon which the said investments have been made, and as to the rights of the several parties in such investments, and that the Complainant cannot safely proceed to execute the trusts of said will, without a judicial construction thereof, and an ascertainment of the rights of the several persons and classes of persons concerned.
>
> "It is not the province of courts to declare the rights of parties, except in cases where immediate relief can be given. If there is not matter in dispute, and the

application is to do nothing more, than *to declare further rights,* in such a case courts will not entertain jurisdiction.

"But this is an application by a trustee, under a bill, directed to make large investments upon certain trusts and limitations, in regard to the validity of which, and the rights of the parties in regard thereto, grave doubts have arisen. Under such circumstances, we are of opinion that he is entitled to the aid of this Court, to instruct him as to his duties, and to protect him in the discharge of them, now, and in the future emergencies of the family of the testator."

See *Woods vs. Fuller,* 61 Md. 457.

The common course may be for the trustee to decline acting without the sanction of a court of equity and to leave the cestui que trust to have recourse to the courts. But this method is not the only one open to the trustee and he can appeal to the equity court as party plaintiff in a suit affecting the construction of the trust. The question of whether a party should be made plaintiff or defendant is not material to an equity court, so long as such court has jurisdiction over the subject-matter of the suit.

Dimmock vs Bixby (supra.)

See

Woolsey vs. Dodge, 30 Fed. Cas. 18032.
U. S. vs. Pacific R. R. Co., 90 U. S. 607.
Piatt vs. Oliver, 3 McLean 27.

It is not proper on appeal to question the disability of a party to bring suit. An error of this kind is one which should be raised at the outset of a suit. A case in point is that of *Chicago vs. Cameron* 22 Ill. App. 91, 105.

"Even if the defendants in error, as stockholders, had not the legal capacity to sue, the rule is that the personal disability to sue, if apparent upon the face of the bill, must be raised by demurrer, and if it does not appear on the face of the bill, advantage must be

taken of it by a plea in the nature of a plea in abatement. Mitford's Equity Pleadings, Tyler's Edition, 245 and 318; Story's Equity Pleadings, 88, 493, 494; 1 Daniell's Chancery Practice, 52, 57, 84.

"There was in this case no demurrer or plea. Answer to the merits was filed. The question of the capacity to sue cannot be raised after a hearing on the merits or error."

An adequate remedy at law does not oust equity jurisdiction when an element of trust exists. It may that a court of law in some cases has jurisdiction over trusts; in some cases of trusts a statutory remedy may be given; but the jurisdiction of the equity court also obtains, and we find a concurrent jurisdiction.

(Reporter's Notes.) "3. In cases involving trusts the jurisdiction of equity is not dependent upon the absence of a remedy at law."

M'Campbell vs. Brown, 48 Fed. R. 795.
See *22 Ency. Pleading and Practice, p.* 14.
Hopkins vs. Grimshaw, 165 U. S. 342, 359.

PERPETUITIES.

The last will and testament of Thomas Kearney, of San Antonio, Texas, upon which this case arose, bears date of June 4, 1896, (Rec. 8). It was executed in the county of Webb, State of Texas, and was duly admitted to probate in that county. The testator at the time of his death on July 4, 1896, owned real estate in the District of Columbia of considerable value and also had in bank in the District of Columbia a sum of money amounting to about $14,000. By various elaborate and contradictory provisions the testator attempted to convey his property to two trustees to be managed and controlled by them until the first of January, 1928. The trustees named were Elijah S. Drake,

of Port Gibson, Mississippi, the Complainant in the original suit herein, and Leroy M. Taylor, of Washington, D. C. The parties for whom this trust was attempted to be created were the daughter, grandchildren, and niece of the testator. The original bill in this cause was filed May 15, 1900, and the decree rendered June 27, 1900. (Rec. 7 & 24). By this decree all of the will of Thomas Kearney relating to real estate in the District of Columbia was adjudged void as violating the rule against perpetuities. Miss G. K. Jordan had been made party defendant and had submitted a formal answer. She filed on October 29, 1901, a bill to review the decree of June 27, 1900, and this bill of review is now before the Court on Appeal.

We will consider in the first place whether the will violated the rule against perpetuities, and then discuss the question of the particular rights of the Appellee.

The Statute of Wills of Maryland passed in 1798 was in force in the District of Columbia at the time of the death of the testator and up to the time when the present code went into effect on January 1, 1902. The section relative to perpetuities provides "no will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation, or appoint to any uses not now permitted by the Constitution or laws of the State." 2 Kilty's Laws of Maryland, ch. 101, sub. ch. 1; Sec. 2. Abert's Digest, District of Columbia Laws, ch. 70, Sec. 2. The law in force since the Code went into effect is much the same and is found Sec. 1023, D. C. Code.

The leading case on the subject of perpetuities is that of *Ould vs. Washington Hospital*, 95 U. S. 304, 312, which case came to this court on a writ of error from the Supreme Court of the District of Columbia. In that case there was an action of ejectment and upon issue joined the case was submitted to the lower court upon an agreed statement of facts. One of the questions raised was that the devise of the

tract of ground mentioned in the will was void because it created a perpetuity. Mr. Justice Swayne delivered the opinion of the Court.

> "A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with the fraction of a year added for the term of gestation, in cases of posthumous birth."
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> * * * * *
>
> "The same rules generally apply to legal and equitable estates. They are alike descendable, devisable, and alienable."
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> * * * * *
>
> "There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies as well to trust as to legal estates. The objection is as effectual in one case as in the other. If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect. Such is the law upon the subject."
>
> See *Hopkins vs. Grimshaw*, 165 U. S. 342, 355.

When a term in *gross* is taken, that term, if a term can be measured by years, is limited to twenty-one years. This is logically in line with the rule covering a life in being and twenty-one years thereafter, for, as we have seen above, the fact that the contingency may "*possibly*" happen outside the proper limits invalidates the trust. If there was a gross term of twenty-two years and the party entitled to the particular estate should die within the first year the property would not go to those entitled to the remainder until after the life in being and twenty-one years. This is recognized early in the Supreme Court of the United States.

> "It is the acknowledged rule, that an executory devise is not too remote, if the contingency may happen within a life or lives in being, or twenty-one years and a few months after. In the present case *the contingency must have happened within twenty-one years, at all events.*"
>
> *Barnitz's Lessee vs. Casey*, 7 Cr. 456, 469..

And for a further discussion of the rule applicable to a term in gross, see Gray's Rule Against Perpetuities, 2nd. ed., Section 223 and 185. Applying these rules to the case in hand. *By item 5* of will of Thomas Kearney, (Rec. 9.) we find as follows:

> "I hereby appoint them and their successors, as hereinafter provided, trustees for the purpose of managing all the real property in item 2 and 3 of this will, from and after my death continuously until the year 1928, subject however to the conditions and limitations hereinafter imposed, and devise to them, the said Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake, of Port Gibson, Miss., and their successors, all and singular, the property mentioned in item 2 and 3 hereof, in trust for the uses and purposes and under the conditions hereinafter mentioned. Said trust to be continued in them and their successors until the first day of January, 1928. Said trustees and their successors to have full, free and absolute possession and control of the same until the date last above mentioned, with full power and authority to let and lease the same for said period, and to collect all rents and revenues accruing therefrom, with full power and authority to take all necessary steps either in or out of court to collect said rents and revenues and to protect and preserve said property; * * * ."

In item 7 of the will, the trustees are directed to pay, out of the rents and revenues, the taxes, repairs and insurance on this property.

In item 15 there are directions in regard to rebuilding in case of destruction by fire.

In item 18, there is a direction for the substitution of an Incorporated Trust Company in the District of Columbia in case the trustees fail, refuse or become unable to act.

In item 19, a reference is made to the rents and revenues derived from all the real estate in Washington, D. C.

In item 20, there are directions to the trustees to keep the houses insured and in repair, to pay the taxes thereon, and to rebuild them in case of destruction by fire.

In item 21, there is a general provision covering the rents and revenues from this property and a disposition of the property itself as follows: "On the first day of January, 1928, the title and ownership of the Washington, D. C., property, not hereinbefore disposed of, shall be and is hereby vested," as therein directed.

In item 22, there is a provision directing compensation to the trustees.

Nowhere in the succeeding items of the will is there found any provision modifying the disposition of the property found in item 5. On the contrary throughout the entire will there are found provisions carrying out the scheme therein plainly laid down, that the trustees were to have the control and management of this property until January 1, 1928. These statements refer, of course, simply to the general scheme of the will and not to the particular devise to Miss G. K. Jordan, the Appellee herein. Is this property rendered inalienable beyond the life or lives in being and twenty-one years? Is there any contingency which *must* happen within a life or lives in being and twenty-one years? Is there any contingency which *must* happen within twenty-one years at all events? In the words of item 5 of the will, "said trust to be continued in them (trustees) and their successors until the first day of January, 1928." The testator died on July 4, 1896. (Rec. 22.) Were a trust of

this kind valid the property would be in the hands of the trustees from July 4, 1896, to January 1, 1928, a period of thirty-one years and some months, and would be inalienable during that time. This trust violates the rule of law and is void.

The invalidity of this trust is not affected by the clause in item 21 of the will which provides "they (the devisees) shall receive the net rents arising from the respective houses and lots hereinafter devised to them respectively" upon the happening of certain events. Were this simply a passive trust from and after the happening of the event therein named, it might be contended that the rule against perpetuities did not apply. This contention would be based on the ground that the estates would coalesce. The word "net" takes the case out of the domain of passive trusts and makes it clearly an *active* trust. The word "*net*" means "obtained after deducting all expenses." Standard Dictionary; Bonner's Law Dictionary (Rawle's Revision); *St. John vs. Erie Railway Co.*, 22 Wall, 137, 148. The trustees then are to pay over the rents after deducting all expenses. What expenses? Why the expenses mentioned by the testator as chargeable against the rents of these houses, such as repairs, taxes, insurance. These expenses are naturally and ordinarily deducted from rents. And this construction fits in with the intention plainly manifested in items 5 and 7 of the will. The trustees are there empowered to pay these expenses during the entire period of their trust, or until January 1, 1928.

> "The income only was to be paid to his son 'after deducting taxes and necessary expenses.' The legal title was in the trustee, and therefore the legal and equitable title cou'd not coalesce under the rule in Shelley's Case." And the trust was upheld as an active trust.
> *Stambaugh's Estate*, 135 Pa. St. 597.

"We repeat, the mere fact that the *cestui que trust* has the entire beneficial interest in the trust estate is no test in determining whether the beneficial interest is a trust or a use. To hold so would be to abolish all distinctions between a trust and an use. Where the conveyance imposes on the trustee active duties with respect to the trust estate, such as to sell and convert it into money, or to lease the same and to collect the rents, issues and profits thereof, and pay them over to the beneficiary, it creates a trust which the statute does not execute."

Meacham vs. Steel, 93 Ill. 145.

See

Perry on Trusts, Sec. 305.
Girard Life Ins. Co. vs. Chambers, 46 Pa. St. 486.
26 American and English Ency. Law, p. 143.
Slater vs. Rudderforth, 25 App. D. C. 497.
MacCarthy vs. Tichenor, 29 Wash. L. R. 442.

APPELLEE'S INTEREST.

The general trust provisions of the will of Thomas Kearney are void. In what way, if any, can the interest of the Appellee in 611 M Street, N. W., Washington, D. C., be distinguished from the void possessions. The will makes specific mention of this piece of property. (Rec. 8 et seq.)

In items 3 and 5 of the will it is named as one of those pieces of property devised to the "trustees and their successors to have full, free and absolute possession and control of the same" until January 1, 1928. This piece of property is not separated in these items from the other pieces named and is subject to the same provisions that control the others therein.

In item 6, there are provisions for the payment of the rent of 611 M Street, to Appellee each month, and in case the rental falls below the sum of forty dollars, the trustees are to make up the difference, but in case the rental was over forty dollars, she should have all of it.

In item 7, the income from 611 M Street is excluded from the payment of taxes, repairs and insurance on the property.

In item 8, it is provided that upon the death of Appellee the fee simple title in 611 M Street, should be vested in Thomas K. Vertner, the testator's grandson. *Provided*, that if the Appellee should die before January 1, 1928, Thomas K. Vertner should receive from the trustees only the net rents and revenues. *Provided further*, that if Appellee die before Thomas K. Vertner shall have attained the age of twenty-two years, then, from the date of Appellee's death until Thomas K. Vertner shall have arrived at the age of twenty-two, the rents were to be disposed of by the trustees as was provided in the case of the other pieces of property.

In item 15, the duties of the trustees are restricted to the property in Washington, D. C., and in Virginia.

In item 17, there are directions in regard to rebuilding all the property in the case of fire and 611 M Street is not separately mentioned.

In item 18, there is the provision for the substitution of trustees, covering all the property.

In item 20, there are directions to the trustees to pay the taxes, insurance, repairs, and to rebuild in case of fire, and 611 M Street is not separately mentioned.

In item 21, mention is made of the rental from 611 M Street, in that it was not to go into the common fund with the rents derived from the other pieces of property. Then in the clause designating the particular pieces of property which were to go to the different grandchildren, it is noteworthy that 611 M Street is not mentioned.

Particularly as to Items 3 and 5.

These items are conflicting and involved. From them is to be obtained the intent of the testator, if such can be

done. There can be no question but that by the provisions of items 3 and 5 (Rec. 8.) an estate was attempted to be devised to the trustees *to take effect from the date of the testator's death and continue until January 1, 1928.* In item 3 of the will the testator recites that he owns certain pieces of property in Washington, D. C., and specifically mentions lot 611 M Street, N. W., in the city of Washington. In item 55 he devises to trustees all the real property mentioned in item 3 of the will and he specifically gives to the trustees the "full, free and absolute possession and control of the same" until January 1, 1928. In what way could a testator more emphatically and plainly state that he was creating a trust estate.

Moreover note that *no distinction* is made in these two items *between this property,* 611 M Street, and the other property *conveyed to trustees.* So far as the provisions of these items are concerned they stand on the same footing. The powers and duties granted to the trustees cover this lot as fully as the remaining pieces. The possession and control of the trustees over this piece of property is as full and complete under these items as is the possession and control of the trustees over any and all the other pieces mentioned. No distinction is made in these two items in regard to the time during which the trustees are to hold the property, they are to have all of the property until January 1, 1928.

Now item 5 is the only item in the will of Thomas Kearney which specifically conveys any right, title or interest in this Washington property to the trustees. In no other clause in the will is a property right of any kind in the property conveyed in words to the trustees. These trustees owe their existence to item 5 of the will. They derive their authority and control over the Washington property from item 5. It is true that in some cases equity will not allow a trust estate to fail for want of a trustee, but here are

named certain specific trustees in whose integrity and business capacity the testator has full faith. The entire property in Washington is given to them, and it is these trustees and these trustees alone to whom we look in this matter. It would not be equity to wrench the estate, or a portion of the estate, from these trustees so as to avoid the rule of perpetuity. The trust conveyed to them must stand or fall according to the will of the testator as expressd in the document now before the Court.

GENERALLY.

The Supreme Court and Court of Appeals of the District of Columbia upheld this devise of 611 M Street to the Appellee, Gabriella K. Jordan, principally upon the grounds that items 6 and 8 (Rec. 8.) of the will created a trust separate and independent from the other trusts in the will. In item 6 all the rents and revenues derived from 611 M Street are to be paid to her by the trustees during her life. Item 6 provides that the remainder in fee-simple of this property goes to the grandson of the testator upon the happening of certain events, until such events happen the trustees to receive and disburse the rents and revenues. There can be no contention but that these two items look to the vesting of 611 M Street in trustees. The learned Court of Appeals, in its opinion rendered in this case states, "If it shall become necessary, the Court may, under its general equity jurisdiction, appoint another trustee, for the purpose of giving effect to the execution of the trust." (Rec. 57.) But we are not here dealing with a single devise of property where no trustee is named; we are endeavoring to get at the intent of the testator. Can it be that the intent of the testator looked to the vesting of a estate in trustees for the life of Appellee, at all events? Dr. L. M. Taylor and E. S. Drake

are named trustees by the testator in item 5 of the will because he has full faith in their integrity and business capacity. In item 6 the direction is to *"my said trustees"* to pay the rental during the life of Appellee, and "my said trustees" are further authorized to increase the amount paid Appellee to forty dollars a month, should the rental of 611 M Street fall below that figure. In item 8 the entire first clause of the paragraph follows and depends upon the first line "*my said trustees* are authorized and instructed." The intent of the testator was to convey this property to the trustee named and to none others. These trustees were named and the validity of the trust must be determined by the estate conveyed to them.

Can this devise of 611 M Street to the trustees to the use of Appellee *be separated* from the devise to the trustees of the remaining property. This property was named in item 3 and was conveyed to the trustees together with the other pieces of property therein set out; no distinction was made in regard to the authority and control of the trustees; and in no other place is 611 M street or the other pieces of property conveyed to the trustees but in item 5. The term until January 1, 1928, runs throughout the entire scheme of the testator's devise of the Washington property. In item 5 it is given as the limit to the trustees' powers, it is mentioned in item 7, it is referred to under the proviso in item 8, it is given again as the limit of the trustees' powers in item 19; and in item 21 comes the clause giving the date upon which the property therein named shall vest, January 1, 1928.

The testator looked upon the estate conveyed to Appellee in items 6 and 8 as subject to the same restrictions as that imposed upon the other portions of the estate. It is specifically excepted from the provisions of item 7. By the provisions of item 8 the rents and revenues of the property are excepted from the action of all but the second proviso. No

exception of this property is made from item 18. It is excluded in item 21. Why should the testator have particularly excluded the devise to Appellee from these items if he had not considered that they were included in those items.

While it is true that the devise of an equitable life estate will not be avoided by an unlawful attempt to postpone the enjoyment, as held by the learned Court of Appeals (Rec. 56), these devises may be considered in determining the true intent of the testator as shown by the whole will.

In the last section of item 8 is an example of a clause to the trustees which runs even beyond the attempted life estate to Appellee.

The learned Justice in the Supreme Court of the District of Columbia held that the annuity in favor of Gabriella K. Jordan stands as an incumbrance or rent-charge primarily against lot 611 M street, and secondarily against his entire state for any balance of forty dollars per month that the rents of this lot might not yield (Rec. 41). Upon what basis can it be said that the intention of the testator was to have this allowance to his niece take precedence over all the other provisions of the will and become a primary charge against his estate? Note particularly that the argument used is for the purpose of learning the *intent* of the testator. In this case there is an elaborately drawn will covering almost fourteen pages of the printed record, containing twenty-two numbered items and which disposes of property of great value. Moreover, the reason and purpose of all this writing, was the testator's tender solicitation for his children and grandchildren, and his determination to preserve the bulk of his property intact for them until the date mentioned, January 1, 1928. The gift to Miss Jordan, at most was only a life estate in one small piece of property, with even the remainder over to one of his grandsons. Can it be that it was the primary intent of the testator to look

after this one small devise and make it an encumbrance on his entire property, with precedence over all others.

The word "remember" sometimes used in connection with legacies is very expressive and peculiarly applicable here. It may appropriately be applied to the devise to Miss Jordan. The testator, while preparing carefully his will for the benefit of his children and grandchildren, wished to "remember" his niece. Why is there so much difficulty in holding void this life estate of Miss Jordan, when the entire framework of the will, so far as concerns the trust over the Washington real property, has been destroyed.

INTEREST OF LILLIE K. VERTNER.

In item 7 of the will (Rec. 11) there is a provision which looks to the vesting of the title to a certain vacant lot on Twentieth street, Washington, D. C., in the granddaughter of the testator. This clause of the will, and it is the only clause dealing with this lot, attempts to vest the fee-simple title in this grandchild upon her reaching the age of nineteen years, provided the testator did not improve the said lot during his lifetime. In case the testator made improvements upon this lot during his lifetime, the fee-simple title did not vest in Lillie K. Vertner until January 1, 1928, but she would receive only the net rents until that date.

The learned Justice in delivering his opinion in the Supreme Court of the District of Columbia held that this devise of the vacant lot on Twentieth street was a valid disposition of the property (Rec., 41). However, while it may be true that an unlawful attempt to postpone the enjoyment of an interest in remainder does not affect the particular estate, the facts of the present case go rather to the breaking down of the particular estate itself. This vacant lot on Twentieth street was particularly named in item 3 of the will. It was conveyed by item 5 to the

trustees therein named, the "said trustees and their successors to have full, free and absolute possession and control of the same" until January 1, 1928 (Rec., 9). And this item 5 is the only portion of the will wherein the testator devises this vacant lot on Twentieth street to the trustees. No distinction is made in these items 3 and 5 between this vacant lot on Twentieth street and the other pieces of property therein named. The powers and duties of the trustees under this will have reference to the date January 1, 1928. This property is devised to these particular trustees, and to no others, and it would not subserve the purpose of the testator to take the estate away from the men "in the integrity and business capacity" of whom the testator had such full faith (Rec., 9). The learned Court of Appeals suggested that this might be done in the case of the property devised to Gabriella K. Jordan, the appellee herein, but the entire framework of the will is based upon the control of the trustees over the property until January 1, 1928.

Wherefore, it is respectfully submitted that the decree of the Court of Appeals and the Supreme Court of the District of Columbia should be reversed and the bill of review dismissed.

FRANK SPRIGG PERRY,
Counsel for Petitioner.

OCT 9 1906
JAMES H. MCKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1906.
No. 179.

C. S. LANDRAM AND J. A. BROADDUS, Executors, et al.,
Appellants,

vs.

GABRIELLA K. JORDAN,
Appellee.

Appeal from the Court of Appeals, District of Columbia,
No. 1476.

NOTICE OF PETITION FOR LEAVE TO FILE A BRIEF IN BEHALF OF MARY B. KEARNEY.

Take notice that the annexed petition for leave to file a brief and be heard in the above entitled cause on behalf of Mary B. Kearney, petitioner, will be presented to the Supreme Court of the United States on Tuesday, October 8, 1906, at the coming in of the Court or so soon thereafter as counsel can be heard.

October 3, 1906.

FRANK SPRIGG PERRY.
Bond Building, Washington, D. C.
Counsel for Petitioner.

To

JOHN J. HEMPHILL, ESQ.,
Washington, D. C.

THOMAS P. WOODWARD, ESQ.,
Washington, D. C.

W. MOSBY WILLIAMS, ESQ.,
Washington, D. C.
Counsel for Appellants.

CHARLES F. WILSON, ESQ.,
Washington, D. C.

FRANK W. HACKETT, ESQ.,
Washington, D. C.
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

C. S. LANDRAM AND J. A. BROADDUS, Executors, et al.,
Appellants,

vs.

GABRIELLA K. JORDAN,
Appellee.

Appeal from the Court of Appeals, District of Columbia,

No. 1476.

PETITION FOR LEAVE TO FILE A BRIEF ON BEHALF OF MARY B. KEARNEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner Mary B. Kearney, respectfully asks leave to file a brief and be heard in the above entitled cause and, as grounds for this request, respectfully shows to the Court as follows:

That your petitioner is the widow of Edmund Kearney, who departed this life on or about June 4, 1898, and that there are no children or descendants of children now surviving. That the sole heir-at-law of the said Edmund Kearney was his sister, Mrs. Constance K. Vertner, since deceased. Edmund Kearney left by will of date of June 2, 1898, all his property real and personal to your petitioner, with the exception of a bequest of five hundred dollars, but this will was not in proper form to pass title to real estate under the laws of the District of Columbia, so that he died intestate as to all real property situate therein. Thomas Kearney, the father of said Edmund Kearney, who departed this life on or about July 4, 1896, owned real property of considerable value in the District of Columbia

and attempted to dispose of it by a will dated June 4, 1896. By a decree of the Supreme Court of the District of Columbia filed June 27, 1900, this will of Thomas Kearney was held to be in violation of the rule against perpetuities so far as concerned the real estate situate within the District of Columbia and that he died intestate as to all real property situate therein. The real estate of Thomas Kearney in the District of Columbia descended to his two children, Constance K. Vertner, since deceased, and Edmund Kearney, the husband of your petitioner. That Constance K. Vertner died on or about June 6, 1904, and disposed of all the property received from Thomas and Edmund Kearney by will. The three children of Constance K. Vertner, who are her heirs-at-law and devisees under her will, have been made parties to this suit together with the Executors of Constance K. Vertner and are all represented in this Court by counsel. Your petitioner is interested in this case to the extent of her dower rights of a third in the real estate left by her husband, Edmund Kearney.

That a bill to review the decree of the Supreme Court of the District of Columbia of June 27, 1900, was filed by Gabriella K. Jordan, one of the devisees under the will of Thomas Kearney, and the Supreme Court of the District of Columbia under date of July 8, 1904, modified its former decree and held valid this devise of real estate in the District of Columbia to Gabriella K. Jordan. This decree of July 8, 1904, was sustained by the Court of Appeals, District of Columbia, on April 4, 1905. *Landram vs. Jordan*, 25 App. D. C. 293. The appellants therein are now prosecuting their appeal to this Honorable Court.

That your petitioner was not made a party to any of the proceedings in this cause. That while the heirs herein have recognized the claim of your petitioner to a third interest in the real estate of her deceased husband, Edmund Kearney, in the District of Columbia and paid her for a long

time a proportionate part of the rental, no dower has been formally assigned your petitioner. That this decree of the Supreme Court of the District of Columbia of July 8, 1904, modified the prior decree of the same Court and held valid a certain devise of land in the District of Columbia to Gabriella K. Jordan, and will materially injure your petitioner in that the dower interest of your petitioner in this real estate will be reduced proportionately. The statement of errors in the Court of Appeals, District of Columbia, was as follows:

> The suit of Gabriella K. Jordan *vs.* Elijah S. Drake, trustee, and others, in the Supreme Court of the District of Columbia, from the final decree in said suit, in which this appeal has been taken, was instituted for the purpose of reviewing and modifying the decree entered on the 27th day of June, 1900, in the cause of Elijah S. Drake, trustee, *vs.* Leroy M. Taylor, trustee, and others, construing the last will and testament of Thomas Kearney, deceased, so far as the same devised or attempted to dispose of lands situated in the District of Columbia, and that the Appellee be permitted to remain in the enjoyment of the rents and revenues derived from the real estate in the District of Columbia as provided in the sixth item of the said will, and that the Court below erred in overruling the demurrers of the appellants and in entering a final decree on the 8th day of July, 1904, and in not sustaining appellants' demurrers and dismissing the bill of review of Appellee.

The right of your petitioner to dower is necessarily involved in the determination of the construction of the will of Thomas Kearney and will be materially affected by a decree in this cause.

That the interests of your petitioner are involved in this case is recognized by the decrees of the Supreme Court of the District of Columbia of July 8, 1904, and of the Court of Appeals, District of Columbia, of April 4, 1905, in both

of which it is held that the interests of your petitioner are not concluded by the decrees therein rendered. *Landram vs. Jordan*, 25 App. D. C. 301. But while your petitioner will not be technically bound, her rights will be in effect determined, as the principal grounds for any rights she has in dower depend upon the invalidity of the will of Thomas Kearney and of each of its provisions relating to the real estate situate within the District of Columbia, and will be considered and decided by the decree in this cause. *California vs. Southern Pacific Co.*, 157 U. S. 229.

The right of your petitioner to dower before assignment is one which the law will protect and your petitioner is entitled to stand with the heirs in a suit involving the property. *Shepherd vs. Manhattan Railway Co.*, 117 N. Y. 446, affirming same case in 57 N. Y. Super. Ct. 5; *Sykes vs. Chadwick*, 18 Wall. 145; *Rogers vs. Potter*, 32 N. J. L. 78.

Wherefore, trusting in the exercise of that well known liberality of this Honorable Court in permitting interested parties to be heard (*Northern Securities Co. vs. U. S.*, 191 U. S. 555), your petitioner prays that she may be allowed to file a brief herein or be heard in such manner and upon such terms as this Honorable Court may see fit to direct.

Respectfully submitted.

MARY B. KEARNEY.

F. SPRIGG PERRY,
Counsel for Petitioner.

STATE OF MISSISSIPPI,
County of Adams.

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge

are true, and those stated upon information and belief I believe to be true.

MARY B. KEARNEY.

Subscribed and sworn to by me this 22nd day of May, 1906.

RICHARD F. REED,
Notary Public.

(NOTARIAL SEAL)

AUTHORITIES IN SUPPORT OF PETITION.

In the case of the *Northern Securities Co., vs. U. S.*, 191 U. S. 555, this Court has stated that great liberality is permitted in the matter of allowing interested parties to be heard. In the petition in the present case it is shown that the party making the present application to be heard is materially interested in the decision herein. Her rights will in effect be determined by a decision in the case, even though the court in its decree excepts her interests.

Green vs. Biddle, 8 Wheat. 1, 17.
The Gray Jacket, 5 Wall. 370

Your petitioner was not made a party to the bill of review in either the Supreme Court or the Court of Appeals, District of Columbia. That she was a necessary party to the bill is apparent from the authorities cited in the brief herewith attached. Petitioner desires to be heard but she does not wish to waive her right to object to this bill for want of parties. As petitioner is neither plaintiff nor defendant in the present suit she is not entitled to a judgment in her favor or liable to a judgment against her.

Florida vs. Georgia, 17 How. 478, 495.

Supreme Court of the United States.

No. 179.—October Term, 1906.

Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, Appellants, *vs.* Gabriella K. Jordan. | Appeal from the Court of Appeals of the District of Columbia.

[October 22, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court upon a bill of review brought by Gabriella K. Jordan, the appellee. The decree under review was rendered in a suit for the construction of the will of Thomas Kearney and for the determination of the validity of a trust created by it, so far as the same concerned land in the District of Columbia. That decree declared the trust bad as attempting to create a perpetuity. Under the bill of review the decree was modified, on demurrer, to the extent of the interest of Gabriella K. Jordan, and the trust was declared valid as to her. App. D. C. . The executors of the testator's heir and a daughter of the said heir appealed to this Court.

Thomas Kearney died on July 5, 1896. The will disposes of land in various places. In item 3 it enumerates the testator's property in Washington. In item 5 it devises this and other property upon a trust to be continued until January 1, 1928, and there and elsewhere, with the following exception, makes a fund from the Washington rents and profits to be disposed of as directed in the will. Item 6 is as follows:

"I hereby authorize and direct that my said trustees shall during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' Street, N. W., Washington, D. C.; but, in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said amount of forty dollars for each and every month; it being my desire that she shall have a regular income of at least forty dollars per month, and that the same shall be paid over to her monthly; but if the income derived

from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof." (Rec., 10.)

Item 7 directs the trustee to let all the Washington property, except 611 M street, and out of the rents to pay ninety dollars a month to the testator's daughter, Constance K. Vertner, as ordered in item 5; the residue, so far as necessary, to be applied to the support and education of her three children, named, with further provisions. Item 8 gives the remainder in fee of 611 M street to the testator's grandson, provided that if Gabriella Jordan dies before January 1, 1928, he shall only receive the rents and profits, and if she dies before the grandson reaches the age of twenty-two the rents shall be disposed of as provided in item 7 as to other Washington property. In item 21, the testator, "for fear that there may be some difficulty in construing the different provisions" of the will, states his intention that all the money arising from the Washington rents, "except that which is to go to Gabriella K. Jordan, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Virginia; (2) of (90) ninety dollars per month to my said daughter, Constance K. Vertner during her natural life; (3) for the support, education and maintenance of my said three Vertner grandchildren until Lillie K. Vertner shall have arrived at the age of nineteen years, and until Edmund K. and Thomas K. shall have arrived at the age of twenty-two years respectively."

The persons in whose favor were made the provisions which were adjudged bad were one of the testator's heirs, his daughter, Constance K. Vertner, and the children of Constance. The daughter pleaded that the other heir, Edmund Kearney, also provided for in the will, died, leaving her his heir, that the trust was bad, and, by implication, that she was entitled to the property which it embraced. She now is dead. By the original decree the whole trust fund, including that given to Gabriella Jordan, went to the testator's heirs as property undisposed of by the will. The only person dissatisfied with that decree was Gabriella Jordan, and on the other hand the executor and children of Constance are the only appellants from the decree on review. According to the rule that has been laid down in this Court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error. *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 527. *The Stephen Morgan*, 94 U. S. 599. *Chittenden* v. *Brewster*, 2 Wall. 191, 196. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 621. We assume this rule to be correct. Although her counsel attempted to argue the validity of the trust as a whole, and other questions, we assume, without deciding, the decree to be unimpeachable and right except so far as appealed from. Therefore we shall confine ourselves to considering whether the gift to Gabriella is so intimately connected with the failing scheme as to fail with it.

It would be a strong thing to say that we gather from this will an intent that, if the trust so far as it concerns the testator's descendants should fail because they prefer to take the property by intestacy free from the limitations of the will, therefore the one gift outside his family should be defeated also. The trust is not a metaphysical entity or a Prince Rupert's drop which flies to pieces if broken in any part. It is a provision to benefit descendants and a niece. There is no general principle by which the benefits must stand or fall together. It is true that all the Washington property was given to the trustees in one clause and that a part of the scheme in favor of the testator's grandchildren was the creation of a fund from the rents. But, as is stated in item 21, 611 M street was excepted from the scheme, and the whole income of this lot, or in other words an equitable estate in the specified land, is given to Gabriella Jordan for life by item 6. If that were all we see no reason for a doubt that that gift would be good, whether the gift to the other beneficiaries were good or not. The fact that the testator's daughter takes all the rest of the property instead of her children getting a postponed interest in a part, is no ground for denying to the niece the life estate given to her in an identified and excepted piece of land. It does not make the case any worse that a part of the property thus going to the testator's daughter is the remainder in the estate given to his niece.

The appellants lay hold of the instructions to the trustees to add to the rents enough to make Gabriella's income up to forty dollars a month, and argue as if the gift were in substance only a gift of forty dollars a month from a fund that cannot be established. Such is not the fact. The gift is primarily and in any event a gift of the income of 611 M street. But whatever may be the fate of the rest of the trust we see nothing to hinder the trustees from keeping the income up to forty dollars from the other property devised to them. Of course they could not derive income from property not included in the trust, and only the property included is charged with the liability. The decree may be modified by inserting after the words "against his entire estate" the words "in the District of Columbia."

It is objected in argument, although not in the pleadings, that the widow of Edmund Kearney has a right of dower in the Washington estate which descended to him, and that she should have been made party to the bill of review. The fact of the widow's existence does not appear of record as against the appellees, and we agree with the Court of Appeals that the objection is made too late.

Decree affirmed.